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THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Green Bay Packers, Inc. and
National Football League Properties, Inc.
v.
Marc A. Sebor

Opposition No. 91120345
to Application No. 75246847
filed on February 24, 1997

RECONSIDERATION

Robert Lloyd Raskopf, Claudia Bogdanos and Horace E.
Anderson of White & Case for Green Bay Packers, Inc. and
National Football League Properties, Inc.

David O. N. Johnson of Meyer, Puklich, Merriam & Johnson for
Marc A. Sebor.

Before Quinn,¹ Walters and Drost, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

On May 19, 2003, opposers, Green Bay Packers, Inc. and
National Football League Properties, Inc., filed a "motion
for reconsideration" of the board's decision of April 8,

¹ In connection with this motion for reconsideration, Judge Quinn has
been substituted for Judge Cissel, who has retired.

2003. In that decision the board dismissed the opposition, finding insufficient evidence to establish opposers' claims under Sections 2(a), 2(d) or 13(a) of the Trademark Act because opposers had failed to establish their ownership and the status of the pleaded registrations; and finding that there is no claim preclusion with respect to the April 30, 1998 agreement between the parties.

Applicant filed a brief in opposition to opposer's motion, and opposer filed a reply brief, which we have considered. The board regrets its delay in considering this motion.

In its motion for reconsideration, opposer contends that the board erred in concluding that the record in this case does not establish Green Bay Packers, Inc.'s ("Packers") ownership and the validity of the registrations pleaded in the notice of opposition. The reconsideration motion before us does not involve the Board's ruling with respect to the claim preclusion finding.

In support of its motion, opposers made the following statement (Motion, pp. 2-3):

The record before the board contains sufficient "other evidence" to establish opposers' present ownership of the pleaded registrations. Exhibit No. 3 to applicant's testimonial deposition includes the results of a computerized search conducted for applicant and evaluated by an attorney at an intellectual property law firm: the Dialog® search report includes Federal Registration No. 1,810,704 owned by opposer the Packers, for the mark GREEN BAY PACKERS, in

International Classes 16 and 25. (Deposition of Marc A. Seborá "Seborá Dep.") Ex. 3, p. 22 The search listing for this GREEN BAY PACKERS registration also cites Federal Registration Nos. 1,100,375 and 1,109,722, for opposers' marks PACKERS and GREEN BAY PACKERS, respectively. (Seborá Dep. Ex. 3, p. 22 (cited under heading "Other U.S. Registrations").) [Footnote: Exhibit No. 3 to Seborá's deposition in its entirety consists of ANSWERS TO OPPOSERS' FIRST SET OF INTERROGATORIES; and RESPONSE TO OPPOSERS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS, and documents produced therewith. The search report cited *supra* was produced by applicant as part of his document production.]

The February 26, 1997, cover letter to Seborá's former counsel accompanying the search report, which was offered into evidence as Exhibit No. 2 to Seborá's deposition, explicitly "note[d] the registration of GREEN BAY PACKERS, on page 22, and the large number of items with respect to which the registration has been accomplished." (Seborá Dep., Ex. 2) As applicant's counsel did not object at deposition to the validity of the cited registrations, the present existence of the cited registrations has been admitted on the record. [Footnote: Counsel's objection to Exhibits Nos. 2 and 3 centered around their relevance to the instant proceeding, in that the trademark search had been conducted for applicant's PACKERONI designation, not PACKARONI. (Seborá Dep., pp.11-13.) However, as it is applicant's knowledge of opposers' GREEN BAY PACKERS registration that is material, the fact that the search was conducted in connection with a different trademark application of applicant is of no moment.]

(Case citations omitted.)

In his response to opposers' motion, applicant makes the following statement (Response, p. 1):

Opposers were left with the evidence and testimony presented at trial, which did not establish opposers' ownership or use of any marks. The applicant Marc A. Seborá (Hereinafter "applicant") conceded that opposers have a trademark in "Green Bay Packers," "Packers" and "America's Pack Green

Bay, USA and Design." The board was aware of this and aware of the opposers' ownership in the marks, but did not take it into consideration because of procedural decisions - the opposers' failure to timely file their exhibits resulted in exclusion. It was the opposers' responsibility to establish ownership in their marks and their failure to do so should result in excluding the evidence.

This odd statement by applicant appears to be, essentially, a concession that he had previously conceded opposers' ownership and the validity of the pleaded registrations.²

Opposers cite several decisions in support of their position that the board erred. In *Squirtco v. Tomy*, 212 USPQ 304 (TTAB 1981), rev'd on other grounds at 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983), opposer introduced its registrations into evidence during the testimony of its witness, but the witness did not testify as to the current status of the registrations. The board concluded that the registrations were properly of record due to applicant's failure to object to this deficiency and applicant's

² Applicant makes several contentions in his response to opposers' motion for reconsideration that are not well-taken:

(1) He contends that the motion should not be considered because it was filed late under the provisions of Trademark Rule 2.129(c). However, the final day for the filing of opposers' motion was April 18, 2003, which was a Sunday, thus, permitting the filing of the motion on the next business day, which was Monday, April 19, 2003 - the date on which opposers' motion was timely filed.

(2) He contends that opposers, in their motion, improperly submitted new evidence and "reargue[ed] points presented in their brief on the original motion." (Brief, p. 3.) The exhibits submitted are copies of exhibits properly submitted at trial. These exhibits are copies of the specific evidence at trial that opposers contend is sufficient to establish opposers pleaded registrations.

(3) On pp. 3-21 of his response (beginning with subsection "C" on p. 3), applicant merely reargues the merits of the case, which is improper, as applicant himself noted. This portion of his response has not been considered.

Opposers note these points in their reply brief and, therefore, their reply brief has been considered.

treatment, in its brief, of the registrations as part of the record. Similarly, in the cited case of *Jockey International, Inc. v. Frantti*, 196 USPQ 705 (TTAB 1977), the board considered the pleaded registrations to be properly of record because applicant so treated them in its brief. Opposers herein argue that applicant's concession in its brief as to the title and status of opposers' pleaded registrations should be accepted even if applicant's untimely brief is not otherwise considered.

Opposers also refer to *Tiffany & Co. v. Columbia Industries, Inc.*, 455 F.2d 582, 173 USPQ 6, (CCPA 1972), wherein opposer predicated its claim on ownership of pleaded registrations, but neither filed status and title copies thereof, nor established the same through testimony. Applicant in that case, in answering the notice of opposition, denied any likelihood of confusion, but did state that it "admits the registrations referred to in the notice of opposition." Additionally, one of the pleaded registrations had been the basis for a refusal during examination, which was subsequently withdrawn, and a copy thereof was in the application file. The court stated the following (at 855):

The purpose of pleadings is to apprise a party by fair notice of the case it has to meet, and the Federal Rules of Civil Procedure reject the approach that pleading is a game of skill. *American Novawood Corp. v. United States Plywood-Champion Papers, Inc.*, 426 F.2d 823, 827, 57 CCPA

1226, 1281 (1970). We think that at least with respect to Reg. No. 137,722, appellee had such notice without the attachment of copies.

... appellee did not deny appellant's ownership of the registration, but rather admitted "the registrations referred to in the notice of opposition." Reg. No. 137,722 shows on its face ownership in opposer and makes out a prima facie case of ownership under § 7(b) of the Lanham Act, 15 U.S.C. § 1057(b). Appellee cannot and does not contend lack of familiarity therewith since that is the registration which was interposed by the examiner during the ex parte examination of the opposed application. Finally, that the opposition was premised on the ground of likelihood of confusion with this mark is apparent from the notice of opposition.

Since appellee had fair notice of the case it had to meet, it would work an injustice on appellant under these circumstances to deprive it of the right to rely on the statutory presumptions flowing from registration of the mark TIFFANY for playing-cards and chips and cribbage-boards, Reg. No. 137,722 ...

In *Crown Radio Corp. v. The Soundsciber Corp.*, 506 F.2d 1392, 184 USPQ 221 (CCPA 1974), another case relied upon by opposer, petitioner did not submit status and title copies of its registrations with its notice of opposition, nor did it take any testimony. However, respondent, subsequent to filing its answer, submitted a search report with copies of the reported registrations, including those pleaded by petitioner, attached thereto. The court concluded that this was an admission as to the existence of opposers' registrations. In a concurring opinion, Judge Miller emphasized that this submission was also an admission of the present existence of these registrations.

Also relied upon by opposer is the case of *Hollister v. Downey*, 565 F.2d 1208, 196 USPQ 118 (CCPA 1977), wherein opposer attached to his notice of opposition a copy of his order for "status" copies of his pleaded registrations, applicant's answer was in the nature of a denial, and neither party took testimony. The court found that the board was incorrect in holding that the registrations were not properly of record because the status copies in the record did not show title. The court found that, to the contrary, the status copies with opposer listed thereon as owner established a prima facie case of title in opposer which applicant did not rebut by his answer. The court concluded that applicant had fair notice of the case he had to meet because the notice of opposition named the registrations and included copies thereof showing ownership by opposer on their faces. The court stated the following (at 120):

Under the circumstances of this case, the board could have set a time for Hollister to obtain and file proof of title. A flexible, not mechanical, approach was warranted under these circumstances, particularly in light of the intervening fee change. Expediting of appeals is laudable, but dismissing on purely mechanical grounds can, as it did here, prove wasteful of judicial resources.

The board directs the parties' attention to the case of *Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 18 USPQ2d 1710 (Fed. Cir. 1991), wherein opposer did not submit any evidence during its testimony period, but did attach

photocopies of its pleaded registrations to its notice of opposition; and applicant, while admitting that the pleaded registrations *issued* to opposer, denied for lack of knowledge or information that, *inter alia*, opposer's pleaded registrations were valid and subsisting. The court concluded that the denials by applicant in its answer constituted a challenge to the current status and title of opposer's pleaded registrations and opposer failed to act. The court made the following statement (at 1713):

In sum, the circumstances of this case do not establish a prima facie case precluding application of 37 C.F.R. 2.132(a). While it is true that the law favors judgments on the merits wherever possible, it is also true that the Patent and Trademark Office is justified in enforcing its procedural deadlines.

The evidence to which opposers herein refer in order to establish their pleaded registrations includes abstracts from a Trademark Scan search report retrieved from the Dialog database (Exhibit No. 3 to opposers' deposition of applicant). The referenced abstract for Registration No. 1,810,704 (pleaded by opposer herein) includes reference by number alone to Registration Nos. 1,100,375 and 1,109,722 (also pleaded by opposer) as "other U.S. Registrations." The abstract lists "original applicant" and "owner at publication" and that the mark is registered.

The search report letter also relied upon by opposer (Exhibit 2 to opposers' deposition of applicant) makes the following statements regarding the marks of opposer:

Please note the registration of GREEN BAY PACKERS, on page 22, and the large number of items with respect to which the registration has been accomplished. Note also that food is not included.

...

In our opinion, this search substantially supports our earlier opinion that, if the mark PACKERS is capable of dilution as a result of the use of the word PACKERONI, it must have already been fully diluted by the above prior usages and registrations on foods. You will note, however, that there are a number of applications with respect to foods, which were abandoned. It is possible that the Green Bay Packers may have objected to those usages, resulting in the applicants abandoning their applications, rather than getting involved in a fight.

Upon reconsideration, the board is persuaded that, considering all the facts and circumstances of this case, opposers' pleaded registrations may be considered to be of record. As the court indicated in *Hewlett-Packard*, the board is justified in enforcing its procedures and the two exhibits referenced in opposers' motion for reconsideration are not enough, alone, to warrant the conclusion that opposers' pleaded registrations are of record. However, consistent with the preference of courts to consider cases on the merits, we find there is no question that applicant is aware of the case against him and of the registrations pleaded by opposers. In this regard, in addition to the exhibits noted by opposers in their motion, we have also

considered applicant's earlier solicitation of a licensing arrangement with NFL Properties; the agreement between the parties settling the opposition against applicant's earlier application to register the mark PACKERONI; and the statement in applicant's response to this motion, which we consider to be essentially an admission as to the status and title of opposers' pleaded registrations.

Our initial opinion described the nature of the record and the established facts and we now add thereto opposers' following pleaded registrations:

Registration No. 1,100,375 for the mark PACKERS for "entertainment services in the form of professional football games and exhibitions," in International Class 41;

Registration No. 1,109,722 for the mark GREEN BAY PACKERS for "entertainment services in the form of professional football games and exhibitions," in International Class 41 [the registration includes a disclaimer of GREEN BAY apart from the mark as a whole];

Registration No. 1,810,704, under Section 2(f) of the Trademark Act, 15, U.S.C. § 1052(f), for the mark GREEN BAY PACKERS for "trading cards, posters, magazines and books regarding football, postcards, calendars, wrapping paper, paper gift boxes, paper stickers, paper napkins, paper towels, posterbooks, notepads, paper hats and greeting cards," and "men's, women's and children's clothing and footwear; namely, coaches caps, wool hats, painters caps, baseball caps, visors, headbands, ear muffs, knit face masks, belts, wristbands, t-shirts, tank tops, pajamas, golf shirts, sweaters, sweatshirts, jackets, neckties, braces, bibs, jerseys, night shirts, coats, robes, raincoats, parkas, ponchos, sneakers, gloves, scarves, snow suits, mittens, aprons, down jackets, leather jackets, shorts, sweatpants, jeans, pants, knickers, socks,

underwear, bathing suits and leg warmers," in International Classes 16 and 25, respectively; and

Expired Registration No. 1,743,691 for the mark



for "entertainment services in the form of professional football games and exhibitions," in International Class 41 [the registration includes a disclaimer of AMERICA'S, GREEN BAY and USA apart from the mark as a whole].³

Likelihood of Confusion

In view of our decision that opposers' pleaded registrations are of record in this case, we now consider, first, opposers' claim of likelihood of confusion on its merits. We recall that the subject application, Serial No. 75246847, seeks registration of the mark PACKARONI for "pasta," in International Class 30.

Inasmuch as opposers' registrations are of record, there is no issue with respect to opposers' priority. *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our determination of likelihood of confusion under Section 2(d) must be based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E.I. du*

³ This expired registration is of record, but it is of no probative value other than to show that it issued.

Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

With respect to the goods and services of the parties, applicant's "pasta" would appear to be quite different from opposers' entertainment services recited in Registration Nos. 1,100,375 and 1,109,722. However, the evidence of record establishes that the Green Bay Packers is one of the NFL football teams; that the NFL football games are broadcast nationally on television and via the Internet through a number of broadcast partners; that opposer NFL has numerous licensees and sponsors that use its various trademarks, including those trademarks involved herein, generating "hundreds of millions of dollars annually"; that the Green Bay Packers' licensed products sell well, especially in connection with the team's participation in Super Bowl XXXI; and that opposers' have numerous food

licensees across a wide range of different categories of food and drink, including cereals, cake decorations, ice cream, food snacks, condiments, and popcorn, and numerous sponsors, for example, Campbell's Soup, Anheuser-Busch, Quaker Oats, Coca Cola, Hershey, Kraft and Oscar Meyer. [Proper Dep., 10/18/01, pp. 14 -15.]

Similarly, we observe that the goods identified in the application and those in Registration No. 1,810,704 are quite different. However, we find the evidence of substantial licensing of opposers' marks probative of the scope of use of opposers' marks by licensees on a wide variety of goods including many types of clothing, dolls, trading cards, and video games. [See Proper Dep., 10/18/01, p.14.]

In view of these facts, we find that the circumstances surrounding opposers' entertainment services and its identified goods, particularly the vast network of sponsors and licensees, are such that, if the parties' goods and services are identified by confusingly similar marks, relevant consumers are likely to believe that applicant's goods and opposers' goods and services come from related sources. See *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000) on remand 56 USPQ2d 1859 (TTAB 2000) (On remand, board found likelihood of confusion between the FRITO LAY for snack foods and FIDO LAY for dog treats); and

Turner Entertainment Co. v. Nelson, 38 USPQ2d 1942 (TTAB 1996) and cases cited therein [numerous logo-imprinted products are used as promotional items for "a diverse range of goods and services," and licensing of trademarks on collateral products unrelated to those goods or services with which mark is normally used has become common practice]. See also, J.T. McCarthy, *McCarthy on Trademarks and Unfair Competition*, Section 24:61 (4th ed. 2004).

Turning to the marks, we note that while we must base our determination on a comparison of the marks in their entirety, we are guided, equally, by the well established principle that, in articulating reasons for reaching a conclusion on the issue of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety." *In re National Data Corp.*, 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Considering, first, opposers' PACKERS mark, we find that both marks, PACKERS and PACKARONI, have the identical first syllable, PACK; that the ER portion of opposers' mark and the AR portion of applicant's mark are very similar in sound and appearance. The "S" at the end of opposers' mark is of little significance and, in the context of applicant's goods, the ARONI suffix rhymes with and suggests the

identified goods, pasta (*i.e.*, macaroni). Regarding the connotations of the marks, applicant attempts to distinguish his mark by arguing that the PACK portion of its mark refers to backpackers, who are one group to whom he intends to market his goods. We take judicial notice of the fact that the word "packer" is defined as "one that packs, esp. one whose occupation is the processing and packing of wholesale goods, usually meat products,"⁴ and consider it equally likely that relevant consumers would attribute this meaning to the PACKAR portion of applicant's mark. This would be the same meaning attributed to opposers' mark PACKER. Thus, we conclude that the marks are substantially similar in sound, appearance, connotation and overall commercial impression.

Regarding opposers' GREEN BAY PACKERS marks, we note that the GREEN BAY portion is geographically descriptive of the team's origin and it modifies the dominant term, PACKERS. Thus, we refer to the above discussion comparing the mark PACKERS to applicant's mark and find this mark is also similar to applicant's mark PACKARONI in commercial impression.

In conclusion, in view of the substantial similarity in the commercial impressions of applicant's mark, PACKARONI, and opposers' marks, PACKERS in Registration No. 1,100,375

⁴ See *The American Heritage Dictionary*, 2nd ed., 1985.

and GREEN BAY PACKERS in Registration Nos. 1,109,722 and 1,810,704, their contemporaneous use on the goods and services involved in this case is likely to cause confusion as to the source or sponsorship of such goods and services.

In view of our finding, *infra*, that a likelihood of confusion exists, we need not and do not address opposers additional claims under Sections 2(a) and 13(a) of the Trademark Act, 15 U.S.C. §§ 1052(a) and 1063(a).

Decision: The opposition is sustained.⁵

⁵ Because the board has granted reconsideration and sustained the opposition, under Trademark Rule 2.129(c), 37 CFR 2.129(c), reconsideration is applicable as provided therein from the date of this decision.